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IN THE

Supreme Court of the United States

October Term, 1948. No. 627

ANDREW T. TILLMAN, MARIE FRANCES TILLMAN,
Intervener, Petitioner,

v.

GRACE TILLMAN,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit and Supporting Brief.

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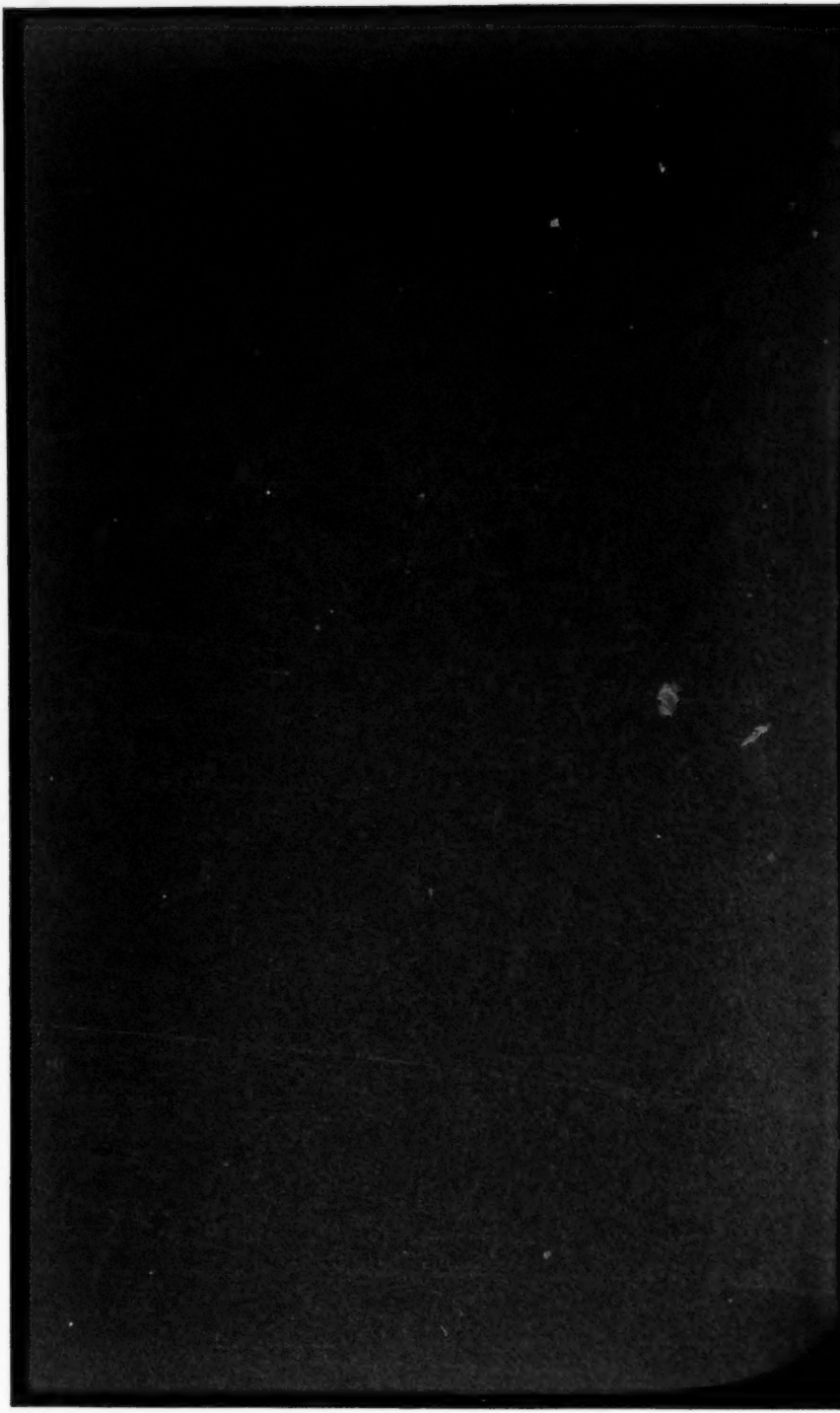
THE REPORTER COMPANY, INC., Walton, N. Y.—1949



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No.

ANDREW T. TILLMAN, MARIE FRANCES TILLMAN, *Intervener, Petitioner,*

v.

GRACE TILLMAN, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND SUPPORTING BRIEF.

The intervener prays respectfully that a writ of certiorari be issued to review the judgment entered in the above entitled cause by the United States Court of Appeals for the District of Columbia Circuit on December 6, 1948 or the order of the United States Court of Appeals for the District of Columbia January 26, 1949.

Opinions Below.

There was no opinion written by the United States District Court for the District of Columbia. The findings of fact and conclusions of law and orders are contained

in the record. The opinion of the Court of Appeals of the District of Columbia Circuit is not yet officially reported. It is contained in the record and as appendix to petitioner's brief.

Jurisdiction.

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on December 6, 1948 and the orders denying the motion to intervene and for rehearing are dated January 26, 1949. The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Summary Statement.

Andrew T. Tillman obtained a divorce from his wife, Grace Tillman, on June 26, 1945. By mistake of his attorney she was designated as Cora G. Tillman which was not discovered until after entry of the judgment of divorce. Cora Tillman was name of plaintiff's first wife who died October 21, 1926, a fact known to Grace whom plaintiff married November 29, 1929, and from whom plaintiff had been separated since November 1, 1932. In giving his attorney the statement of facts for the complaint plaintiff named both wives which counsel mistook for the name of the defendant only. Grace Tillman, the real defendant, was personally served with process and was represented at the trial by attorney appointed to defend in Civil Action No. 24397. Grace Tillman was aware of the mistake and did nothing to correct the error or abate the action until after judgment was entered and had become final. Upon discovery of the error plaintiff immediately filed a motion to correct the record. While said motion was pending plaintiff filed a second suit for divorce in

Civil Action No. 33010. After the judgment in the first suit became final and while the second suit was pending plaintiff died. Defendant thereafter filed a motion in the second suit to determine her marital status which motion was consolidated with the motion to correct the record and heard by the trial judge. After hearing on the motions and full investigation the trial judge ordered the substitution of the name of Grace Tillman for Cora G. Tillman in the judgment for absolute divorce entered on June 26, 1945 in Civil Action 24397. That order has never been appealed. In a separate order in Civil Action 33010 the court dismissed said action on the ground that the matter therein had been disposed of by the judgment in the preceding case. From that order in Civil Action 33010 only the defendant appealed. Petitioner's attorney appeared below as *amicus curiae*. The decision below held that the order of the trial court correcting the error in the judgment of June 26, 1945, was improperly and erroneously entered because plaintiff had died before the motion was disposed of and because the mistake was not apparent on the record, the court below making such finding although the order in said case was admittedly not before the court on appeal. Marie Frances Tillman and Andrew T. Tillman, deceased, had lived together several years as husband and wife and continued so to live together after the judgment of June 26, 1945 became final and until plaintiff's death March 20, 1946. Upon such a showing the trial court granted Marie Frances Tillman's motion to intervene in the hearing to correct the record. The court below, however, with full knowledge of Marie Frances Tillman's claim of interest, denied her motions to intervene on appeal and for rehearing.

Questions Presented.

1. Whether a mistake as to the first name of the defendant in a divorce action may be corrected under Rule 60(a) of the Federal Rules of Civil Procedure, upon a proper showing, after final judgment in said action in favor of the plaintiff who made the motion to correct, but who died while said motion was pending but after the said judgment had became final.

2. Whether petitioner, (a) having been permitted to intervene in the hearing before the trial judge on plaintiff's motion to correct clerical error in the judgment, (b) who was treated as a party in the decision below and who was aggrieved by said decision had a right to intervene on appeal and file a motion for rehearing.

3. Whether the United States Court of Appeals for the District of Columbia can reverse an order of the United States District Court for the District of Columbia which has not been appealed, which decision is adverse to a person who was not a party on appeal.

Rule Involved.

Rule 60(a) of the Federal Rules of Civil Procedure provides as follows: Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Specification of Errors.

The Court of Appeals erred:

(1) In holding that the judgment of divorce which had become final could be corrected only during the lifetime of the parties.

(2) In holding that the judgment could be corrected only as to mistakes which are "apparent on the record," that is, without necessity of "hearing extraneous evidence to demonstrating the actuality" of the mistake.

(3) In reversing an order of the District Court which was not before the Court below on appeal.

(4) In denying petitioner's motions to intervene and for rehearing, although petitioner had been permitted to intervene in the hearing on the motion to correct the record and was treated as a party in the decision below.

Reasons for Allowance of the Writ.

1. The Court below has decided an important question of Federal Law which has not been expressly decided by this Court and which should be here settled. The purposes of the Federal Rule of Civil Procedure 60(a) were to simplify and expand the authority of the Court to correct clerical errors in judgments and to remove the restrictions of Equity Rule 72 which limited the power of the Court to make such amendments only within the term of court within which the judgment was entered and to remove the time limitations and notices in a similar statute in California and other states, by providing that clerical errors could be corrected by order of the Court *at any time* "after such notice *if any* as the Court orders." The

decision below tends to defeat that purpose by restricting the time to the lifetime of the parties and notices of the motion to correct the error must be served personally upon the defendant. A further restriction upon Rule 60(a) inflicted by the decision below is that errors in judgments cannot be corrected in personal actions. The decision disregards the fundamental principle that the right to correct a clerical error in the judgment is not determined by the nature of the action and is not personal but by the right and the power that are inherent in the Court. The Court below in its decision would further restrict the application of Rule 60(a) by confining the right to correct clerical errors in the judgment only as they appear upon the face of the record and without extraneous evidence as to the actuality of a clerical mistake.

2. The Court below in reversing an order of the Trial Court which had not been appealed has so departed from accepted and usual courses of judicial proceedings as to call for an exercise of this Court's power of supervision.

3. The lower Court's denial of petitioner's motion to intervene on appeal and for rehearing, after reversing an order of the Trial Court not appealed, is an error of procedure and a miscarriage of justice which only a review and reversal by this Court can correct.

Conclusion.

For the foregoing reasons as supported in the brief hereto annexed petitioner respectfully submits that the petition for writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

October Term, 1948

No.

ANDREW T. TILLMAN, MARIE FRANCES TILLMAN, *Intervener, Petitioner,*

v.

GRACE TILLMAN, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Right to Seek Certiorari.

While petitioner was not an original party to either divorce action she was permitted by order of the Trial Judge to intervene in the hearing upon plaintiff's motion to correct the record. A showing of petitioner's interest as the common law wife of Andrew T. Tillman, deceased, was a prerequisite to the order permitting her to intervene. Since the order correcting the record was not appealed and the petitioner's interest was protected by the amended judgment of June 26, 1945, there was no reason

for petitioner to appeal until the decision below reversed the order correcting the clerical error in the judgment. In such decision petitioner was treated as a party although not referred to in terms. Under such circumstances petitioner had the right to intervene and upon her motion being denied, had the right to petition for writ of certiorari. 3 C.J. 639, Ctg. *Savannah vs. Jesup*, 106 U. S. 563, and numerous other cases in Note 13. In the District of Columbia such a right was long ago recognized as shown in *Automobile Brokerage Corporation vs. U. S.*, 59 Appeals D. C. 243, 39 F. 2d 288, where it was held:

> "Generally one allowed to intervene or, treated as a party may appeal from determination affecting his interests."

In opposition to petitioner's motion to recall and stay the mandate respondent's attorney denied that petitioner had been allowed to intervene and was ever a party in the case on appeal but admitted that petitioner was an intervener in the prior suit which was not appealed.

Petitioner although not a party in the appeal taken by Grace, apparently was treated as a party or at least her rights were determined as if she were a party in the decision below. The orders of the District Court in which the Court below reversed the order correcting the judgment in the first action and the order permitting petitioner to intervene in said action vitally affected her interest as the widow of the deceased Andrew Tillman. Upon learning of the decision of the Court below affecting her interest, petitioner promptly filed in the court below a motion to intervene and a petition for rehearing. Both were denied on January 26, 1949, by an order denying petitioner's motion for leave to file her motion to intervene and petition for rehearing. Under the circumstances, it is believed that while the law is not clear, petitioner has sufficient standing to make this application for certiorari, either as to the decision of the Court below of December

6, 1948, or as to the orders of the Court below of January 26, 1949, denying petitioner's motion for leave to file a motion for intervention and for a rehearing. 4 C.J.S. Sec. 186. The Court below in failing to correct its error when attention was called by petitioner's motion to intervene and petition for rehearing either by granting said motion and petition or by correcting the error *sua sponte* thereby afforded petitioner the right of appeal.

Tex. Civil App. 1943.

> "One who seeks to intervene or otherwise to become a party to a suit, thereby becomes a party to extent, in any event, of determining his right to become such a party, and upon denial of his asserted right he has same right of appeal as any other litigant."
>
> *Dickens vs. State*, 159 S. W. 2d 1005.

Important Question of Federal Law.

The Federal question here involved is the construction of Rule 60 (a) of the Federal Rules of Civil Procedure. It is elementary that a Court may correct a misnomer in a judgment rendered by it. This was so long before and independent of the promulgation of the aforesaid rule. In 10 A.L.R., page 591, it is stated:

> "Among the common errors in judgments, decrees and records are misnomers—mistakes in the names of the parties. *These are almost universally esteemed clerical errors*, open to correction at any time after discovery by *nunc pro tunc* amendments, when established by proper and sufficient evidence, and upon proof of true names,"

citing numerous cases as far back as the year 1559. (Emphasis supplied.) See also 67 A.L.R. 842 and 126 A.L.R. 983 in similar vein and citing many cases from that date to the present.

It is conservative to state that Rule 60 (a) of the Federal Rules of Civil Procedure for the correction of clerical mistakes "in judgments, orders or other parts of the record" *at any time* was not intended to diminish so ancient an incident of legal procedure. There is nothing in the rule nor in the Committee's report which would indicate such an intent. On the contrary, the alteration of former Rule 72 of the Equity Rules which was the basis for the present Rule 60 of the Federal Rules, by permitting the correction to be made "at any time" and also "during the pendency of an appeal," indicates an intention to broaden the rule. The fair intendment of the opinion in the court below is that the correction of the judgment could not be made because the action for divorce, "being purely personal in nature" and having abated upon the death of the plaintiff could not be corrected under Rule 60 (a).

It may be seen, therefore, that the Court below restricted the application of Rule 60 (a) in such circumstances to actions which are not "'personal." We do not find anything in the rule itself nor in the cases relating to the ancient right of the Court to correct its own judgments, particularly as to misnomers, which justify the statement that such corrections are limited to non-personal actions. This view is strengthened by the provision in the rule that the correction in judgment can be made "at any time." The Court below, however, has construed the rule as meaning that the judgment can be corrected at any time *except* that in personal actions the correction may be made only before the death of one of the parties. No ready reason comes to mind why a judgment obviously incorrect as to the first name of a defendant should not be corrected after the death of the parties as before. Indeed, without going into an extended discussion, one might say that the rule permitting the correction of judgments might be more useful and necessary where the parties or some of them have died than when they are living.

The procedure followed in the District Court not only was consistent with Rule 60, but follows the procedure which has been approved under a statute in the State of California comparable to Rule 60 (a). (See footnotes 1, 2 and 3 on page 3276 of Vol. 3, Moore's Federal Practice under the new Federal rules) and McKinney's New California Digest—Judgments Sec. 134; *McGuiness vs. Superior Court,* 196 Cal. 222, 237, P. 42, 50 A.L.R. 1110, Accord: *Barnes vs. Willis,* 65 Fla. 363, 61 So. 828. In the *McGuiness* case *supra* the Court, *after the death of the defendant* in a divorce action which involved no property rights, permitted one who was interested in upholding the decree of divorce to intervene in and contest a motion to set aside the decree. That no distinction should be made with respect to the right to correct a judgment before or after the death of a party would seem to follow from the fact that said right is not personal and may be made upon application of petitioners who were not parties to the original suit of *Renois vs. Griffith,* 230 S. W. 1067. In that case it was held:

> "The fact that the petitioners were not parties to the original suit is immaterial. They were interested in the correction of the judgment * * * The right to have an error in the entry of the judgment corrected is not personal. The right and power to make the correction are inherent in the Court."

The Court below proceeded upon the theory that the action was "no longer pending" after plaintiff's death and apparently that only in "pending action" can a judgment be corrected. As the rule relates to the correction of judgments its usual application is to actions which are no longer pending in the ordinary sense of the word, having been reduced to judgment. An action which has been prosecuted to final judgment is no longer "pending": *Dorsky vs. Moss,* 193, S. W. (2d) 245. The instant action

ceased to be pending when the judgment became final on December 26, 1945, and from which no appeal was taken. Since it was no longer pending on March 20, 1946, when plaintiff died, it could not abate on that date, as the Court below apparently assumed.

Applying this reasoning to Civil Action No. 33010, which had not reached final judgment and was pending at the time of plaintiff's death, that action abated and everything identified with that proceeding. It was so held in the one and only authority cited in the decision below. *Bailey vs. Scott,* 57 App. D. C. 142, 18 F. 2d 184. If that action abated upon the death of plaintiff one might ask by what authority did the Trial Court thereafter entertain defendant's motion to determine her marital status. In *Bailey vs. Scott, supra,* it was stated:

> " * * * divorce suit being a personal action, the *death of either party before the decree* abates the divorce proceedings and this effect extends to whatever is identified with those proceedings. The husband (defendant) *having died pending the case* it was held that the allowance of money to pay the wife's counsel fees is in furtherance of the procedure to obtain or prevent the divorce. When, therefore, the jurisdiction to pass a decree is ended no jurisdiction can survive as to matter purely ancillary to that object."

Ctg. *McCurley vs. McCurley,* 60 Md. 185; *Shaeffer vs. Shaeffer,* 30 Mich. 163; *Zoellner vs. Zoellner,* 46 Mich. 511; *Pearson vs. Darrington,* 32 Ala. 227. (Emphasis supplied.)

Assuming *arguendo* that Civil Action No. 24397 abated upon the death of plaintiff after judgment Rule 60 (a) specifically provides that the Court may correct a clerical error in a judgment "*at any time.*" The rule, which has the effect of statute makes an exception of the power of the Court to correct a clerical mistake in the judgment

and removes the application of the principle set forth in *Scott vs. Bailey.*

In *Fay vs. McQuinn, et al.,* 141 Cal. 573, 75 P. 174, the Trial Court corrected a mistake in the name of defendant in a default judgment *after defendant's death.* On appeal the Court stated that the purpose of amendment was to correct a misprision and in no material respect affected the judgment; its object was to make the judgment conform to the fact. The defendant was the party served with summons. As stated in *McCornville vs. Superior Court,* 248 P. 553, 554:

> "It is well settled that the Trial Court has full jurisdiction to correct clerical errors in its judgment even upon its own motions and that such amendments leave the original judgment otherwise effective and unimpaired."

Ctg. *Homestead Loan Association vs. Gleeson,* 133 Cal. 312, 65 P. 617.

A contention was made in the *Quinn* case, *supra,* that the amendment had the effect of substituting the new for the original judgment to which the Court stated:

> "The claim that the amendment of the judgment 'had the effect of making a new and different judgment' is equally untenable. The purpose of the amendment was to correct a clerical misprision and in no material respect affected the judgment. Its object was to make it conform to the fact that Mrs. M. Quinn was the party defendant served with summons."

In *Cubitt vs. Cubitt,* 74 Kans. 353, 86 P. 465, an error in the judgment of adoption was corrected *after the adopter's death* where the name of the infant's mother was inadvertently written into the judgment in place of the name of the adopter.

Reversal of Orders Which Had Not Been Appealed.

There were two actions in the District Court, Civil No. 24397 and Civil 33010, respectively, both for divorce by the same plaintiff, Andrew T. Tillman. In the first case the defendant was erroneously named Cora G. Tillman, which is the case wherein the District Court entered an order correcting the judgment. No appeal was taken from that order. In the second case, the defendant was named Grace Tillman, and it was in that case that the District Court dismissed the complaint. Grace appealed from that order. Although there was no appeal from the order in the first case, the Court below reversed the said order.

Defendant being a party to both actions, elected to appeal the action that had abated with the plaintiff's death before judgment. The Court below disregarding the fact that the order correcting the judgment was not before the Court on appeal, proceeded to reverse that order to the detriment of petitioner, who was not a party on appeal and in no position to protect her own interest.

It is the accepted and usual course of judicial proceeding that the reviewing Court will not express an opinion on matters not in question in suit before the court. *Phila. & W. R. Co. vs. State of Md.*, 15 U. S. 376. In an appeal on a judgment or order in one case that is predicated upon a judgment in another case, the Court may authorize an inquiry into the other cause of action to discover on what that judgment was founded but does not authorize a re-examination of the validity of that foundation, or of the propriety of the judgment. *State of La. ex rel. Nelson vs. Police Jury of the Parish of St. Martin*, 111 U. S. 716.

It appears that the Court below had the right to consider the judgment entered and amended in Civil Action No. 24397, in its bearing upon defendant's motion to declare her marital status in Civil Action No. 33010, which

was before the Court on appeal, but the Court below did not have the authority to re-examine the proceeding correcting the judgment, or the propriety of that judgment.

It has been repeatedly held in Federal Courts that two separate and distinct causes, which have not been consolidated in the Trial Court, otherwise than for convenience in trying them, cannot be brought up for appeal by one writ of error. Two separate judgments, decrees or orders cannot be brought for appellate review by one writ of error or one appeal, especially where the parties necessary and proper to a review of one of the judgments would not be proper parties to review of the other. 3 C.J. 4, Appeal and Error Secs. 354-355. Ctg. *Brown vs. Spofford,* 95 U. S. 474; *Walter Pierce Oil Co. vs. Van Elderen,* 137 F. 557; *Louisville etc. R. Co. vs. Summers,* 125 F. 719.

That the two motions in the instant cases were consolidated merely for convenience is indicated by the necessity for separate orders, based upon separate and distinct findings of fact and conclusions of law. There was only one appeal which appeal could not possibly carry up the two separate causes of action. It seems that this is especially true here, as the nature of the case shows that Marie Frances Tillman was not a party to Civil Action 33010 until she was treated as a party by the Court below in its decision adverse to petitioner's interest.

It is equally well established that where the appellate court is without jurisdiction of the subject matter it cannot acquire jurisdiction by its decisions or otherwise; its proceedings and judgment are absolutely void, and they can have no effect whatsoever upon the proceedings or judgment of the Court below. 3 C.J. 369, Sec. 124.

If the judgment of divorce and the proceeding by which said judgment was corrected were not before the Court

below, by what lawful means could the Court acquire jurisdiction? The decision did not supply the deficiency. Of what effect, is the decision upon the decree of absolute divorce dissolving the marriage of Andrew and Grace Tillman?

In *Hall vs. Hall,* 122 Pa. Super. 242, 186 A. 318 it was held:

> "Where husband testified in divorce suit without objection and no appeal was taken from decree entered therein, wife in subsequent divorce suit could not attack admissibility of husband's testimony in prior suit."

By analogy it would seem that in the instant case where an order correcting a clerical error in a judgment for divorce in a prior suit is not appealed, the wife in a subsequent divorce suit cannot attack the validity of that order or judgment in the preceding suit.

Such departure from the accepted and usual course of judicial proceedings calls for the exercise of this Court's power of supervision.

Minor Issues.

The Court below gave other reasons or circumstances in support of its reversal of the orders of February 24, 1947, that were subsidiary to the principal reasons. These subsidiary reasons and circumstances will be considered briefly.

Service of Process.

In the Court's opinion, reference is made to the fact that the affidavit made by the plaintiff upon the motion for correction of the judgment does not allege that the summons issued against Cora G. Tillman actually was

served upon Grace Tillman. If it appears elsewhere in the record to the satisfaction of the Court that the true defendant was served with summons, it would be irrelevant that the affidavit of the plaintiff did not so state. It did appear without question that Grace Tillman was served with the summons, and the Court below so stated in its opinion:

> "The District Court proceeded to hear evidence which tended to show that the summons issued in the first case against Cora G. had been served on Grace."

The law is well established that the service of process upon Grace Tillman, although by mistake called Cora G. Tillman was good, in that Grace was the real defendant intended to be served.

Grace who did nothing to call attention to the error or to abate the action until after judgment is bound thereby, and is estopped thereafter to deny her identity.

> "A defendant duly served with process under name other than his true name has burden of revealing true name and taking steps to abate the action, and is bound on failure to do so, by the judgment if he can be identified as the one against whom judgment was rendered: 'name' being merely a word or words by which an individual or thing is designated and distinguished." *Hitt vs. Carr,* Ind., 150 N. E. 810, 815. See also: *Lewis vs. West Side Tr. & Svg. Bk. of Chicago,* 30 N. E. 2d 767; *Edwards vs. Warner,* 111 Ill. App. 32.

Notice of Motion to Correct the Record.

The Court below stated that the notice of motion to correct the judgment was never given to Grace Tillman before its abatement. There are several answers to this statement. As stated above, the action had not abated but had proceeded to final judgment. Assuming *arguendo*

that the action had abated, the rule provides only for "such notice, if any, as the Court orders." Presumably the Court could correct the judgment without notice. Even at common law the Court could correct a judgment of its own motion and without notice: *Brackett vs. Baneges*, 99 Cal. 623, 34 Pac. 344; *McCorwille vs. Superior Court*, 78 C. A. 203, 248 Pac. 553. But assuming notice to be necessary, certainly where the defendant's attorney "acknowledged service of the motion" and where the defendant actually took part in the argument of the motion and the presentation of evidence in connection therewith, because her own motion in a companion case was consolidated with the motion to correct the record and the two were heard together, notice of the motion to correct the judgment was adequately complied with. (It is not believed necessary to comment upon the Court's statement that service of the motion upon Grace's attorney of record was not service upon her.)

Even in the California statute (see Section 473 of the Code of Civil Procedure) it is provided:

> "Where an inspection of the record does not show the error, and resort must be had to evidence aliunde, courts will require notice to be given of a motion to amend the judgment to the parties to be affected thereby."

Evidence Aliunde.

The Court below stated that a mistake in a judgment in a divorce action could not be corrected under Rule 60 (a) unless it "be apparent on the record for otherwise it would be necessary to hear extraneous evidence to demonstrate the actuality of a clerical mistake." Assuming that a mistake in the name of a defendant is a *clerical mistake*, as the cases uniformly hold, there is nothing in the rule nor in the authorities which we have reviewed to

warrant the statement that a mistake in the name of one of the parties in any judgment may not be corrected if the mistake does not appear without extraneous evidence. The efficacy of Rule 60 (a) has thus been destroyed by the Court's limiting its application to situations where no extraneous evidence is necessary. The question of evidence aliunde becomes pertinent only as to whether notice should be given not whether the correction can be made. *People vs. O'Brien*, 4 C. A. 723, 89 Pac. 438.

As stated above clerical errors are open to correction at any time by *nunc pro tunc* amendments when established by proper and sufficient evidence and proof of true names. On appeal in *E. B. Elliott Co. vs. Terrentine*, 113 Florida 210, 151 So. 414, there was a mistake in the name of the defendant in the entire proceeding through the judgment and upon petition the error in the name of defendant was corrected. On appeal the Supreme Court said that while the Trial Court had the power to correct the name of the parties in proceeding and judgment so as to make the records speak the truth as to the parties in fact and in law before the Court, yet, where such corrections of the names might involve questions of jurisdiction over the parties, proofs or admissions and findings should proceed an order making such corrections in the names of the parties on the ground of alleged misnomer. In *Brownlee vs. Grant County*, 101 Ind. 401, it was held:

> "To warrant a Court in amending a judgment *nunc pro tunc* (because of mistake in name) the moving party must establish the mistake and the right of the omitted persons to be included by clear, convincing and competent evidence."

In *McGuiness vs. Superior Court*, 125 Cal. 222, 237, pp. 42, 48 the Trial Court was held to retain jurisdiction *after the death of one of the parties to a divorce action*, in which no property interests were involved "to conduct the in-

vestigation into the integrity of its records, which the plaintiff's motion suggests and which the Court of its own motion is proposing to undertake."

See also:

LeClaire vs. Calls Him, 166 Okla. 242.

As stated in Cyclopedia of Federal Rules of Civil Procedure, 2nd Edition, p. 327: "Under such a rule the Courts are left with a broad range of discretion." Ctg. *Hicklin vs. Marco,* 64 F. 609, which states according to footnote 24 on p. 327: "*The Court is at liberty to ascertain the existence of such an error, and that it is clerical in authorship, by any satisfactory evidence.*" Also to the same effect is Edmunds on "Federal Rules of Civil Procedure," Vol. 2, p. 1503. (Emphasis supplied.)

Estoppel.

The Court below stated that the decedent "estopped himself (and any other person after his death) to say he had been divorced from Grace on June 25, 1945," when he brought the second action for divorce against Grace Tillman and alleged in the complaint in that action that he was the husband of Grace Tillman. The principles of estoppel are fairly well established and it is respectfully submitted that plaintiff was not estopped from pursuing his motion to correct the record (to say nothing of the Court's power to correct its own record upon its own initiative). There are several reasons why the principle of estoppel is not applicable in the circumstances, the most apparent being the plaintiff's allegation that he was the husband of Grace Tillman, notwithstanding his previous action and judgment of divorce against her, was at most a conclusion of law which may not be the basis of estoppel: *D. H. Holmes Company vs. Morris,* 188 La. 431, 177 Sov. 417, 114 A.L.R. 905.

Common Law Marriage.

The Court below stated in the decision that the order of February 17, 1947, granting Marie Frances Tillman leave to intervene only for the purpose of the motion to correct the record, was erroneously entered. The reasons given were: (a) "Marie Frances could not have been Tillman's common law wife, for during all of these years he consorted with her he was legally married to Grace; (b) The motion to correct the record had abated. The matter of abatement has been treated above.

It has been repeatedly held by the Court below that where two people live together as husband and wife, and continue so to live together after removal of the impediment to a valid common law marriage, that such a marriage results automatically. The judgment of June 26, 1945, in which Grace was erroneously named "Cora," became final and effective to dissolve the marriage of Andrew and Grace Tillman on December 26, 1945. Andrew Tillman and Marie Frances Tillman continued to live together as husband and wife until Tillman's death on March 20, 1946. The interval between December 26, 1945 and March 20, 1946, resulted in a common law marriage of Andrew T. Tillman and Marie Frances Tillman. That upon the death of Andrew, Marie Frances and not Grace became his lawful widow. *Thomas vs. Murphy, et al.*, 71 App. D. C. 69, 70, 107 F. 2d 268; *Goodloe vs. Hawk*, 72 App. D. C. 287, 113 F. 2d 753; *Parrella vs. Parrella*, 74 App. D. C. 161, 120 F. 2d 278; and *Williams vs. Williams*, 74 App. D. C. 396, 121 F. 2d 737.

Conclusion.

In view of the above it is respectfully submitted that the petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted:

A. Because petitioner has a right of appeal, having been permitted by the Trial Court to intervene in the hearing on plaintiff's motion to correct the record, having been treated as a party on appeal and whose interests were adversely affected by the decision, and whose motions to intervene and for rehearing were denied by the Court below.

B. Because decision below involves an important question of Federal Law which has not been expressly decided by this Court and should be settled; that the decision below destroys the efficacy of Rule 60 (a) of the Federal Rules of Civil Procedure by imposing undue limitations upon the rule, in that clerical errors in the judgment can be corrected only during lifetime of the parties and where apparent upon the face of the record.

C. Because the Court below has so departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision, in that the lower court assumed jurisdiction of a cause of action that was not before the Court on appeal, reversing an order and setting aside a judgment in said cause.

Petitioner does not know of any remedy other than her petition for writ of certiorari to correct the wrong that has been done her. Petitioner is by law and every right the decedent's widow but is deprived of widow's right because of a mere clerical error.

Respectfully submitted,

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United States Court of Appeals

FOR THE

DISTRICT OF COLUMBIA CIRCUIT

No. 9603

GRACE TILLMAN, APPELLANT

v.

ANDREW T. TILLMAN, APPELLEE

Appeal from the District Court of the United States for the District of Columbia (now the United States District Court for the District of Columbia)

Argued November 10, 1948 Decided December 6, 1948

Miss Naomi Wheeler for appellant.

Mr. Emory B. Smith as amicus curiae.

Before EDGERTON, CLARK and WILBUR K. MILLER, JJ.

WILBUR K. MILLER, J.: This is an appeal from orders entered by the United States District Court pursuant to two motions in two separate divorce actions, the motions having been by order consolidated for hearing.

The first of the two divorce suits was filed May 23, 1944, by Andrew Tillman against Cora G. Tillman. The second action was instituted by him on February 6, 1946, against Grace Tillman. In the first case, Andrew was divorced from Cora G. by a judgment entered June 26, 1945, which he sought to transform into a divorce from Grace by moving, on November 3, 1945, to substitute her name for Cora's. He abandoned that motion, however, by filing the second suit, and then died soon after Grace had answered it, and before any other step had been taken in the new proceeding.

Some months subsequent to his death Grace moved, in the second suit, that the court declare her to be his widow. After intervening action which will be described hereinafter, her motion was consolidated with Tillman's motion to correct the judgment in the first suit which he had made during his life. This consolidation was ordered long after Tillman's death. The trial court, in considering the consolidated motions, proceeded to hear evidence and then announced that Andrew had been divorced from Grace by the judgment against Cora G., and that the second suit against Grace herself should be dismissed. Grace appeals from those holdings. There has been no appearance before us in opposition to the appellant's position except that of an attorney who took the role of amicus curiae. He did not

purport to act for Tillman's alleged common law wife, whom he represented in the District Court.

We shall discuss the two actions separately, for only in that manner can the confusion be cleared, and the legal questions involved made manifest. It will plainly appear that this is not a situation in which there is involved the mere correction of a misnomer of a defendant, as contended by the amicus curiae, and as it may superficially seem to be. For it will be apparent that, because of Andrew's death, both actions abated before the court reached the question of misnomer. Nor do we have here a clerical mistake which, under Rule 60 of the Federal Rules of Civil Procedure, a court may correct at any time; for the face of the record disclosed no mistake, and Tillman died many months before an effort was made (purportedly in his behalf) by the introduction of new and extraneous evidence to show that an error had been made in naming the defendant in the first divorce suit.

Before discussing the details of the two divorce suits, it is necessary to note Andrew's marriages and unconsecrated alliances. He first married Cora Rax, who died in 1926. Later he married Grace Diggs. After living with her some years a separation occurred and he began an extramarital relationship with one Annie Lee. Still later, without having gone through any marriage ceremony, he began to live as man and wife with one Marie Francis, with whom he was so living when he died.

The first suit. On May 23, 1944, although his wife Cora had died some years before, Tillman filed in the United States District Court a suit for absolute divorce against "Cora G. Tillman." A deputy marshal's return of the process issued in that action showed personal service on Cora G. Tillman. When the defendant did not appear, either in person or by counsel, the district judge appointed an attorney to defend for her, who filed what he termed an "Affidavit in Lieu of Answer", stating he had "contacted the defendant" but had found her uncooperative. He did not give the name of the defendant whom he had "contacted." Following the hearing of unreported evidence the court, on June 26, 1945, entered a judgment granting Andrew Tillman an absolute divorce from Cora G. Tillman.

On November 3, 1945, Tillman filed a written motion to correct what he described as a clerical mistake made by his attorney in the judgment "wherein the defendant is designated as Cora G. Tillman, when it should have been Grace Tillman, ..." His affidavit in support of the motion was to the effect that Grace Tillman was the person intended to be named in the complaint, the person to whom plaintiff was married, the person from whom he wanted a divorce, and the person against whom evidence was presented at the trial. It should be noted, however, that Tillman did not allege that the summons issued against Cora G. Tillman actually had been served on Grace Tillman. This motion was brought up for hearing but was never formally passed on by the court, that is to say, no order was entered with respect to it.[1] While it was pending Tillman died on March 20, 1946.

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[1] The motion appears to have been presented to and discussed with District Judge Pine, who refused to enter an order of correction because the record did not show Grace had been served with the summons addressed to Cora G. *See* note 4.

A divorce suit, being purely personal in nature, is abated by the death of either party before judgment, and we held, in *Bailey* v. *Scott*, 57 App. D. C. 142, 18 F. (2d) 184 (1927), that "this effect extends to whatever is identified with those [divorce] proceedings."[2] In that divorce action, the wife died while her motion for the allowance of counsel fees was pending. Bailey, her attorney, then moved for an allowance which was denied because the action had abated with the wife's death. It thus appears that abatement occurs regardless of the survival of the party against whom relief was sought.

Under this rule, Tillman's motion of November 3, 1945, to correct an alleged clerical mistake was abated by his death. Moreover, notice of that motion was never given to Grace Tillman before its abatement. The attorney who had been appointed by the court to defend for Cora G. Tillman acknowledged service of the motion and noted that he had no objection. This did not amount to service on Grace Tillman.

We hold that, because of abatement, Tillman's motion of November 3, 1945, to correct a record which was fair on its face, not only ceased to have any efficacy when he died, but also was no longer pending after his death. It was a closed chapter and the judgment theretofore rendered simply stood as one which divorced Andrew Tillman from Cora G. Tillman, with nothing in the record to indicate a misnomer of the defendant except Tillman's assertion he had intended to sue Grace; and with the record barren of any suggestion that Grace had been served either with process on the complaint or with notice of the motion to substitute her name for Cora's.

That was legally the end of the first suit, but the District Court did not stop then. On January 2, 1947, when Tillman had been dead more than nine months the court permitted the filing of a supplemental memorandum of points and authorities in support of the abated motion of November 3, 1945. It was filed by the attorney who had represented Tillman, who signed as "attorney of record." Filed with the memorandum were three affidavits, two of which tended to show that the woman who called herself Marie Francis Tillman had lived with Andrew Tillman for some years, and until his death, as his common law wife. On February 12, 1947, Marie Francis Tillman, the alleged common law widow, moved for leave to intervene or to be substituted as party plaintiff. Five days later the court entered the following order:

> "Upon consideration of the motion to intervene or for substitution of party plaintiff, filed herein by Marie Frances Tillman, as the common law wife of plaintiff, and it appearing that the plaintiff departed this life on the 20th day of March, 1946, and that attorney appointed to defend herein has indicated his consent to the granting of the motion, it is by the Court, this 17th day of February, 1947,
>
> "Ordered that Marie Frances Tillman be and she is hereby granted leave to intervene only for the purpose of the motion to correct the record filed herein by plaintiff during his lifetime."

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[2] Under an exception to the rule, questions concerning property rights survive for adjudication. There is no such question here. The controversy between two women who want to be the widow incidentally involves whatever pecuniary profit may result from the relationship, but that is not the sort of property right which the exception covers.

The consent of the attorney appointed for the defendant, Cora G. Tillman, was endorsed on the foregoing order. It does not appear, however, that Grace had any notice of this motion and it is plain that the attorney appointed to act for the defendant was not looking after Grace's interests. Indeed, it appears that she was then represented by other counsel, who had no notice of the motion and did not consent to the order.

This order was erroneously entered for two reasons: (a) On the face of the record, Marie Francis could not have been Tillman's common law wife for during all the years he consorted with her he was legally married to Grace. For, as we have said, he was not divorced from Grace by the judgment which purported to divorce him from Cora G., because his attempt to transform that judgment into a divorce from Grace was not accomplished before he died. Death alone ended his marriage relation with Grace. (b) It was futile to permit Marie Francis to intervene "only for the purpose of the motion to correct the record filed by the plaintiff in his lifetime", when that motion had abated nearly a year before and was no longer before the court.

After entering the foregoing order, the District Court proceeded to hear evidence which tended to show that the summons issued in the first case against Cora G. had been served on Grace. Then, on February 24, 1947, the court

> "Ordered that the name Grace Tillman be substituted for the name Cora G. Tillman wherever the same shall appear in judgment entered herein on the 26th day of June 1945, and that said judgment be and same is hereby corrected accordingly."

This order was improperly and erroneously entered: (a) it purported to have been entered pursuant to a motion which had abated through the death of the movant and there was no motion pending; (b) it was based solely upon evidence introduced months after the action had abated by the death of one of the parties.

The second case. Not only did Andrew Tillman fail during his life to pursue his motion of November 3, 1945, to correct the judgment in the first case for an alleged clerical mistake, with the result that his motion abated when death accomplished his tardily expressed purpose of ending his marital relation with Grace; he himself affirmatively abandoned the motion when, on February 6, 1946, he filed in the District Court an action for divorce against Grace Tillman. In his verified complaint he alleged in effect that on that date he and Grace were husband and wife, and by so doing he estopped himself to say he had been divorced from Grace on June 26, 1945. And he closed the door against any other person who might thereafter abortively attempt, after his death, to pursue his motion of November 3, 1945. The purpose of that motion was accomplished when death dissolved his marriage to Grace.

Grace Tillman answered the complaint of February 6, 1946, denying that the separation relied upon as a ground for divorce was voluntary in character. Moreover, she accused Tillman of living in adultery, first with Annie Lee, and later with Marie Francis. She further alleged that she "stands even now ready to become reconciled to the said plaintiff." This answer was filed on February 21, 1946, and before any other step in the action had been taken, Tillman died on March 20, 1946.

On August 29, 1946, Grace Tillman suggested of record the death of Andrew and on the following October 14 she moved the court to enter an order holding that Andrew was her lawful husband when he died, that she is his lawful widow and that the action abated on his death. It was so ordered by the District Court on November 13, 1946, and on November 19 the plaintiff, although he had been dead eight months, "by and through his attorney"[3] moved the court to set aside the marital status order of November 13, and as one of the reasons for so doing said:

> "3. The motion pending before Mr. Justice Pine is one to amend the record in which an absolute decree was entered against the wife of Andrew Tillman wherein a mistake occurs in the name. The motion is to correct the record."

It is, of course, easy to surmise that this vague mention of another motion pending before Judge Pine was a reference to Tillman's motion of November 3, 1945, to correct an alleged clerical mistake in the judgment rendered in the first case against Cora G. Tillman, a motion which, we have seen, was not legally pending after Tillman's death. But the District Court on January 3, 1947, granted the motion of the dead plaintiff to set aside the marital status order of November 13, 1946, and consolidated it "with the motion now pending before Mr. Justice Pine in Civil Action No. 24,397 [the first case] to correct the record in which a mistake occurs in the name of Cora G. Tillman from whom the plaintiff obtained an absolute divorce." We note in passing, not only that the order consolidated the motion for a declaration of marital status with a nonexistent motion in the first case, but also that it assumed, without proof, the truth of the allegation in Tillman's moribund motion of November 3, 1945, that a clerical mistake had been made.

The two cases having thus been consolidated came on for hearing on the two motions before the same district judge; and on February 24, 1947, the day on which the final orders were erroneously entered in the first case, the court set aside the marital status order of November 13, 1946, and dismissed the second action. The second action had abated long before, and the District Court had no power to enter its order of February 24, 1947.

It is well to state, in conclusion, that our holding herein does not contravene Rule 60 of the Federal Rules of Civil Procedure. When one of the parties to a divorce action dies after judgment has been rendered, a clerical mistake in the judgment arising from oversight or omission may be corrected by the court at any time, as Rule 60 provides; but the mistake must be apparent on the record, for otherwise it would be necessary to hear extraneous evidence to demonstrate the actuality of a clerical mistake. Such evidence cannot be introduced on behalf of a dead plaintiff who has not been replaced by another party. The very fact that the District Court here found it necessary to hear proof in 1947 in order to conclude that a clerical

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[3] This was the attorney who had represented Tillman during his life. In a brief filed herein by him, as amicus curiae, he said, "It is admitted that death dissolves the relationship of attorney and client." Yet he filed a motion in the name of his client eight months after the client's death and on February 12, 1947, introduced witnesses purportedly in his behalf. This should not have been permitted by the trial court.

mistake had been made in 1945 in the first judgment sufficiently demonstrates that no such mistake was apparent on the face of the record.[4]

Since in our opinion the District Court had no power over either divorce case after Tillman's death, all orders entered after March 20, 1946, will be set aside. The result is, of course, that Grace is Tillman's widow, as the marriage relation which he swore existed on February 6, 1946, had not been legally dissolved when he died.

Reversed

EDGERTON, J., dissents.

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[4] Judge Pine stated to counsel on February 12, 1947, with respect to a former hearing on the motion to correct the record:

> "When you came to me for correction of the record you merely had the consent of Mr. Dyson (counsel appointed for Cora G. Tillman). Mr. Dyson, having been appointed by the court, is not in a position to consent for the defendant. And I insisted that the real defendant, by whatever name, be served. You say she [Grace] has been served but the record did not disclose that."